

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 41 CS

Administrative Expunction of Nonjudicial Arrest Records

**SPONSOR(S):** Dean

**TIED BILLS:**

**IDEN./SIM. BILLS:**

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Criminal Justice Committee</u>	<u>7 Y, 0 N</u>	<u>Kramer</u>	<u>Kramer</u>
2) <u>Justice Council</u>	<u>10 Y, 0 N, w/CS</u>	<u>Kramer</u>	<u>De La Paz</u>
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

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### SUMMARY ANALYSIS

Criminal justice agencies are required to report every arrest to the Florida Department of Law Enforcement (FDLE), which compiles those arrest records in a database that is publicly accessible. Current law provides that a law enforcement agency may apply for administrative destruction (known as “expunction”) of the record of an arrest made contrary to law or by mistake.

This bill provides that a law enforcement agency must apply for expunction of an arrest made contrary to law or by mistake and provides that the person who was arrested may apply for such expunction if endorsed by the head of the arresting agency or the state attorney. The bill also provides that a law enforcement agency’s filing of an application for expunction cannot be used as evidence in a civil lawsuit.

This bill does not appear to have a fiscal impact on state or local government.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government - This bill appears to increase the responsibilities of local government officials.

#### B. EFFECT OF PROPOSED CHANGES:

Florida has a policy of allowing very broad public access to government records, including records of criminal arrests. The Florida Department of Law Enforcement (FDLE) maintains a central repository of all Florida arrests and convictions. Any person may request from FDLE a Florida criminal history record of any individual for \$23. Employers and licensing authorities commonly make these requests. The stigma of a criminal arrest can cause difficulty when seeking employment or licensure. Some believe this stigma exists even regarding arrests where the individual is cleared prior to trial, or acquitted at trial.

Current law provides for sealing or expunction of criminal history records in limited circumstances. See generally, ss. 943.0585 and .059, F.S. The arrested individual must apply for sealing or expunction, pay a \$75 fee to FDLE, and pay \$37.50 to the clerk should the court order the record sealed or expunged. Sealing or expunction is not automatic, the court may deny the petition. An individual may only have one arrest (and related proceedings) sealed, and then later expunged, in his or her lifetime. A record may not be sealed or expunged if the person was convicted of the crime, or the person was found guilty after pleading guilty or no contest. Records related to certain offenses may not be sealed or expunged.<sup>1</sup>

The arresting agency keeps a sealed record, but the record is confidential and exempt from the public records laws.<sup>2</sup> A sealed record does not appear on a criminal history search requested by a member of the public, but is still available for review by the arrested person and by certain government agencies for specific purposes. When a record is expunged, the arresting agency must physically destroy the record.<sup>3</sup> FDLE does not destroy an expunged record, but keeps a copy of the record as a confidential and exempt record.

An individual who has had an arrest sealed or expunged may lawfully deny the arrest in most circumstances. The FDLE record of an expunged criminal history record is still available to certain government entities for specific purposes.<sup>4</sup>

Alternatively, s. 943.0581, F.S., provides that FDLE may, by rule, provide a process for administrative expunction of an arrest "made contrary to law or by mistake." Unlike sealing or expunction under ss. 943.0585 and .059, F.S., there is no cost to the applicant for administrative expunction, nor are there limits on type of offense or the number of times that an individual may receive an expunction. Rule 11C-7.008, F.A.C., provides that FDLE will administratively expunge a non-judicial criminal arrest record, as authorized by s. 943.0581, F.S., upon the written request of the chief law enforcement officer of the arresting agency.

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<sup>1</sup> Offenses in this category include numerous sex crimes, plus communications fraud, offenses by public employees, drug trafficking, or violation of pretrial release conditions.

<sup>2</sup> Section 943.059(4), F.S.

<sup>3</sup> Section 943.0585(4), F.S.

<sup>4</sup> A record that is sealed or expunged is provided to the appropriate state or local government agency should the arrested person apply for: employment with a criminal justice agency, admission to the Florida Bar, employment with the Department of Children and Families or the Department of Juvenile Justice if the individual will be in a sensitive position (whether employed by agency or by a contractor), or employment in a school or day care center.

A law enforcement agency may make the request for administrative expunction on its own, but more typically it is only made when the arrested person requests that the agency apply for administrative expunction. Current law does not require an agency to seek administrative expunction, and thus a person who has been the subject of an arrest made contrary to law or by mistake cannot file a lawsuit to force a law enforcement agency to apply for administrative expunction. A wrongfully arrested person may, however, file a civil action for damages resulting from the wrongful arrest.<sup>5</sup>

### **Effect of Bill**

This bill requires a law enforcement agency to apply to FDLE for the administrative expunction of any nonjudicial record of any arrest made contrary to law or by mistake. The determination of whether the arrest was made contrary to law or by mistake may be made by the agency at its discretion, or may be the result of a final order of a court of competent jurisdiction.

This bill also provides that an adult or, in the case of a minor child, the parent or legal guardian of the minor child, may apply to FDLE for the administrative expunction of any nonjudicial record of an arrest made contrary to law or by mistake. Either the head of the arresting agency, or the state attorney of the judicial circuit in which the arrest occurred, must endorse the application.

Both new provisions require FDLE to draft implementing rules.

An application for administrative expunction must include an affidavit executed by the chief of the law enforcement agency, sheriff, or department head of the state law enforcement agency, which verifies that she or he has reviewed the record of the arrest and that the arrest was contrary to law or a mistake. The affidavit must include the date and time of the arrest, the name of the arresting officer, the name of the person arrested, and the crime charged.

Additionally, this bill provides that an application, endorsement or affidavit by a law enforcement agency or state attorney is not admissible as evidence in any judicial or administrative proceeding, nor may such application, endorsement or affidavit be deemed an admission of liability in connection with an arrest.<sup>6</sup>

### **C. SECTION DIRECTORY:**

Section 1 amends s. 943.0581, F.S., to provide for administrative expunction of nonjudicial arrest records.

Section 2 provides an effective date of upon becoming a law.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

None.

#### **2. Expenditures:**

None.

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<sup>5</sup> Florida recognizes a civil cause of action for "Wrongful Arrest". See, e.g., *Tursi v. Metropolitan Dade County*, 579 So.2d 150 (Fla. 3rd DCA 1991).

<sup>6</sup> An application for expunction, or an endorsement of such application, is in effect an admission of liability for wrongful arrest. This provision only bars using such application or endorsement as evidence, it does not otherwise bar or limit a civil action for damages filed against a law enforcement agency and/or against its employees.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

This bill requires rulemaking by the Florida Department of Law Enforcement.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

It is possible that law enforcement agencies are reluctant under current law to apply for administrative expunction for fear of admitting an arrest was wrongful, and thereby incurring potential civil liability. This bill provides that an application or endorsement by a law enforcement agency may not be admitted into evidence in a lawsuit filed against the agency. The apparent intent is to encourage agencies to participate in clearing wrongful arrests without the agency subjecting itself to civil liability by the admission of wrongdoing. The bill as written will accomplish this effect as to state court civil actions; however, this provision will not be applicable in federal courts and thus may not have the effect of avoiding potential civil liability under federal civil rights law.<sup>7</sup>

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

The Justice Council adopted one amendment that specified that the affidavit executed by the chief of the law enforcement agency, sheriff or department head must include the date and time of the arrest, the name of the arresting officer, the name of the person arrested, and the crime charged.

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<sup>7</sup> 42 U.S.C. §1983